



Signed: November 24, 2010

EDWARD D. JELLEN
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re

Case No. 10-47520 EDJ
Chapter 13

JOEL RODRIQUEZ LOPEZ,

Debtor.

MEMORANDUM: MOTION TO VALUE COLLATERAL

On September 8, 2010, Joel Lopez, the above-named debtor, ("Lopez") filed a Motion to Value Collateral seeking an order of this court determining the value of the claim secured by a lien held by Wells Fargo Bank N.A. ("Wells Fargo") on the debtor's real property located at 127 Pasco Drive, Brentwood, California (the "Property"). Lopez seeks to limit Wells Fargo's secured claim to the fair market value of the Property, rendering unsecured the portion of its claim that is in excess of that amount.

Bankruptcy Code § 506(a)(1) provides that, "[a]n allowed claim of a creditor secured by a lien on property in which the estate has an interest ... is a secured claim to the extent of the value of

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1 such creditor's interest in the estate's interest in such property
2 ..." 11 U.S.C. § 506(a)(1).¹ A secured claim is thereby limited to
3 the value of the collateral that secures it. But, § 1322(b)(2)
4 provides that a debtor may not, through the chapter 13 plan, modify
5 the rights of a claim "secured only by a security interest in real
6 property that is the debtor's principal residence" In other
7 words, the first priority lien against the debtor's residence is
8 exempt from the so-called "cramdown" provision of § 506(a)(1).

9 Lopez does not dispute that the Property is his principal
10 residence. Rather, he argues that the lien held by Wells Fargo is
11 not secured "only by a security interest in real property" because
12 the lien is secured by the Property, "together with all the
13 improvements now or hereafter erected on the property, and all
14 easements, appurtenances, and fixtures now or hereafter a part of
15 the property." See Supplemental Request for Entry of Default at 1.
16 Lopez argues that because the Wells Fargo lien extends to easements,
17 which Lopez seeks to characterize as personal property, the lien is
18 no longer secured "only" by "real property" and is therefore exempt
19 from § 1322(b)(2). Lopez relies on the Fourth Circuit's reasoning
20 in In re Ennis, 558 F.3d 343, 346 (4th Cir. 2009), which held that
21 the debtor was able to modify the first lien against his principal
22 residence, a mobile home, because it was considered personal
23 property under Virginia law. The Fourth Circuit concluded that the
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25 ¹All further section references herein are to the Bankruptcy
26 Code, 11 U.S.C. § 101 et. seq.

1 real property element of the § 1322(b)(2) anti-modification clause
2 is distinct from, and in addition to, the principal residence
3 element. Id.

4 Lopez's argument fails on three grounds. First, the Bankruptcy
5 Code specifically includes easements within its definition of
6 "debtor's principal residence." See §§ 101(13A), 101(27B) (defining
7 "debtors principle residence" as "a residential structure, including
8 incidental property..." and "incidental property" as "all easements,
9 rights, appurtenances, fixtures, rents, royalties, mineral rights,
10 oil or gas rights or profits, water rights, escrow funds, or
11 insurance proceeds...."). Easements are included in "debtor's
12 principal residence" for purposes of § 1322(b)(2) by the plain
13 language of the Bankruptcy Code.

14 Second, the Ninth Circuit does not follow the rule identified
15 by the Fourth Circuit in Ennis. Rather, the Ninth Circuit BAP held
16 in Lee v. Home Savings of America, 216 B.R. 22 (9th Cir BAP 1997),
17 that chapter 11 debtors were prohibited from modifying the first
18 lien against their primary residence, even though that lien
19 encompassed additional collateral.² Id. at 26. In so holding, the
20 BAP adopted the reasoning of In re French, 174 B.R. 1 (Bankr.D.Mass
21 1994), which held that so called "additional collateral" does not
22 divest a lienholder of the anti-modification provision of
23 § 1322(b)(2) where the collateral is "nothing more than an

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25 ²Note that § 1123(b)(5), applicable in a chapter 11 case,
26 contains anti-modification language that is identical to
§ 1322(b)(2), applicable in a chapter 13 case.

1 enhancement which is or can, by agreement of the parties, be made a
2 component part of the real property or is of little or no
3 independent value." Id. at 7. In the Ninth Circuit, the inclusion
4 of additional collateral that is personal property as security for a
5 first mortgage does not divest the lienholder of the anti-
6 modification protection of § 1322(b)(2).

7 Finally, even if this court were to follow the Fourth Circuit,
8 Lopez would need to show that the lien against his principal
9 residence is also secured by personal property. The determination
10 of property rights in the assets of the bankruptcy estate are
11 governed by state law. See Butner v. United States, 440 U.S. 48,
12 54-44 (1979). Unfortunately for Lopez, easements are real property
13 interests under California law. See Balestra v. Button, 54
14 Cal.App.2d 192, 197 (1942)("An easement in gross is a personal
15 right, or a right attached to the person; it is an interest in the
16 real property of another; but it is not personal property."); see
17 also Callahan v. Martin, 3 Cal.2d 110, 121-22 (1935).

18 The court holds that Wells Fargo's first priority lien against
19 the Property is secured only by a security interest in the debtor's
20 principal residence, and is therefore exempt from the "cramdown"
21 provision of § 506(a)(1). The court will accordingly issue its
22 order denying Lopez's motion.

23 **END OF ORDER**
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